



Crl.O.P.Nos.7948, 7986, 7988, 8042, 8090, 8127, 8239, 8240 & 8241 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on	:29.04.2024
Order Pronounced on	:06.05.2024

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.O.P.Nos.7948, 7986, 7988, 8042, 8090, 8127, 8239, 8240 & 8241 of
2024 and
Crl.M.P.Nos. 5801, 5858, 5895, 5913, 5980, 5981, 5984, 5796 & 5798 of 2024

Crl.O.P.No.7948 of 2024

R.Radha @ Radha Ramalingam

.. Petitioner

/versus/

Madhan Raj

.. Respondent

Crl.O.P.No.7948 of 2024 Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records pertaining to S.T.C.No.3159 of 2022 now pending trial on the file of the Learned Judicial Magistrate No.V, Salem so as to quash the same.

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For Petitioner :Mr.N.Jothi, Senior Counsel for
Mr.S.Vinod

For Respondent :Mr.R.John Sathyan, Senior Counsel for
Mr.A.P.Balaji.



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COMMON ORDER

The respondent herein has preferred a batch of private complaints against the petitioner herein for the offence under Section 138 of Negotiable Instruments Act, 1881 for issuance of cheques to discharge of enforceable liability, but without adequate fund in the account. The complaints were taken on file by the Judicial Magistrate No.V, Salem and issued process to the accused person. After examination of the accused, the trial has commenced.

2. At this juncture, the petitioner/accused has filed the present petitions under Section 482 of Cr.P.C., to quash the complaints on the ground that the issuance of process to the accused/petitioner is in contradiction to Section 202(1) of Cr.P.C and therefore, due to irregularity in the procedure the trial get vitiated under Section 461 of Cr.P.C.

3. The sum and substance of the argument made by the learned Senior Counsel Mr.N.Jothi appearing for the petitioner/accused is that Section 202(1) of Cr.P.C., was amended with effect from 23.06.2006 by inserting a mandate to the effect that if the accused is residing beyond the territorial



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jurisdiction of the Court, which take cognizance of the offence the issuance of process should be postponed till the Court enquire the case itself or direct an investigation to be made by the Police Officer, for the purpose of deciding whether or not there is sufficient ground for proceeding.

4. According to the learned Senior Counsel appearing for the petitioner, in the instant case, the accused/petitioner resides beyond the territorial jurisdiction of the Learned Judicial Magistrate No.V, Salem and therefore, before issuance of process, the Learned Judicial Magistrate should have conducted enquiry and only after being satisfied that there is sufficient ground to proceed, the process should have been issued. Having failed to comply the said mandatory provision, the Criminal complaints are vitiated due to irregularity.

5. To buttress the above submissions, the Learned Senior Counsel has relied upon the following judgments.

(i) National Bank of Oman vs. Barakara Abdul Aziz and another reported in (2013) 2 SCC 488.



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(ii) Tej Kishan Sadhu vs. State and Ors reported in

MANU/DE/1332/2013.

(iii) Vijay Dhanuka and others vs. Najima Mamtaj and others reported in (2014) 14 SCC 638.

(iv) Abhuit Pawar vs. Hemant Madhukar Nimbalkar and another reported in (2017) 3 SCC 528.

(v) C.Ilavarasu vs. State. Rep. By the Revenue Divisional Officer, Periyakulam, Theni District reported in 2019(3) MWN (Cr.) 261.

(vi) Birla Corporation Limited vs. Adventz Investments and holdings Limited and others reported in (2019) 16 SCC 610.

(vii) In Re: Expeditious trial of Cases under Section 138 of N.I Act. 1881 reported in AIR 2021 SC 1957.

(viii) Rithesh Bawri and Ors vs. Dalmia Bharath (ltd) and Ors reported in MANU/TN/6630/2021.

(ix) Jayant and others vs. State of Madhya Pradesh reported in (2021) 2 SCC 670.

(x) In Re: Expeditious trial of Cases under Section 138 of N.I Act 1881 reported in AIR 2022 SC 2481.



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(xi) Nakkheeran Gopal and Damodharan Prakash vs. Rajendran

reported in 2022 (1) MWN(Cr.) 420.

(xii) Nakkheeran Publications and six others vs. C.K.Dhandapani

reported in 2022 (3) MWN (Cr.) 322.

(xiii) Shiv Jatia vs. Gian Chand Malick and Others reported in

2024 (3) Scale 75.

(xiv) Bansilal S.Kabra vs. Global Trade Finance Limited and

another reported in 2024 BHC – AS 5506-FB.

6. On notice, the respondent appeared and filed a common counter. The Learned Senior Counsel Mr.R.John Sathyan appearing for the respondent submitted that the 15 cheques given by the accused/petitioner to discharge his debt were returned for want of fund and therefore, 15 summary trial cases have been initiated and they are all pending before the Judicial Magistrate No.V, Salem for nearly 2 years. Stating one reason or another, the accused with an intention to protract the trial had been filing petitions on frivolous ground and in fact, in one set of petitions filed to quash the complaints. The High Court has directed the trial Court to complete the trial within a period of 6 months *vide* order dated 06.07.2022. However, even thereafter, the petitions are filed on



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unsustainable grounds.

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7. According to the Learned Senior Counsel for the respondent, as far as the present batch of petitions are concerned, the plea taken regarding the violation of mandatory provision under Section 202 (1) of Cr.P.C., is farce and nothing but an attempt to delay the trial by raising a legal issue which has already been settled by the Constitutional Bench of the Hon'ble Supreme Court. After having his attempt to dismiss the complaints on the ground of jurisdiction failed the present petitions are filed couching the prayer differently agitating an issue which is no more *res integra*. Submitting that the learned Magistrate, after perusing the proof affidavit, complaints and material documents issued summons to the accused on arriving at a *prima facie* view that offence is made out.

8. The Learned Senior Counsel appearing for the respondent/complainant submitted that the Hon'ble Supreme Court in *Suo Motu Writ (Criminal) No.2 of 2020*, considered the delay of trial in cases under Section 138 of N.I Act and after considering the judgment in ***Vijay Dhanuka and others vs. Najima Mamtaj and others*** reported in ***(2014) 14 SCC 638*** and



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other judgments which has followed or deferred with a view expressed by the

Hon'ble Supreme Court in ***Vijay Dhanuka*** case, took into consideration the divergence of opinion among the High Courts relating to the applicability of Section 202 of Cr.P.C., in respect of complaints filed under Section 138 of N.I Act and had categorically held that not conducting inquiry under Section 202 of Cr.P.C., would vitiate the issuance of process. However, if requisite satisfaction can be obtained from materials available on record same will not vitiate the trial. The Constitutional Bench of the Hon'ble Supreme Court has also taken note of Section 145 of N.I Act which provides notwithstanding anything contain in the Code. The evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceedings. The learned Senior Counsel for the respondent submitted that in the present case after inquiry, the Magistrate has given a finding that a *prima facie* case under Sections 141 and 142 of N.I Act r/w 138 of N.I Act is made out and thereafter, had issued process. Therefore, there is no ground to entertain the frivolous batch of petitions and sought for dismissal with costs.

9. Heard the Learned Senior Counsels appeared on either side.



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10. This Court, to ascertain whether the Judicial Magistrate before issuance of process to the accused satisfied himself that there is sufficient grounds for proceeding against the accused, called for the records from the Court below and the same was received through the Registry and perused the records.

11. Point for consideration is whether Section 202 (1) of Cr.P.C., is complied in the case in hand.

12. From the perusal of the records, this Court finds that apart from the complaints, sworn affidavits of the complainant have been filed along with the documents relied on and thereafter, the complaints have been taken on file and process issued. On appearance of the accused, he has been questioned about the complaint. Having denied the content of the complaint, the trial has commenced and the complainant has marshalled his witnesses. The petitioner/accused has filed a petition under Section 91 of Cr.P.C., and also an unnumbered memo to reject the complaints for want of territorial jurisdiction. Thereafter, at the fag end of the trial, he has approached this Court alleging that the Judicial Magistrate has violated the mandate under Section 202(1) of



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13. Section 202(1) of Cr.P.C., reads as below:-

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercise his jurisdiction]. postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by, a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made, –

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.”

14. The object and reasoning for inserting the said Amendment with effect from 23.06.2006 has been extracted in some of the judgments cited by the learned Senior Counsel appearing for the petitioner. The object of the



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amendment is to prevent the innocent persons from harassment by the unscrupulous person by lodging a complaint in a far of place and force the accused persons to attend the Court beyond the territorial jurisdiction of the accused residence. In this case, the accused is residing in Namakkal District, which is the neighbour District to Salem where the complaints have been lodged. The complaints disclose that the cheques given by the accused were drawn from Karur Vysya Bank, Thiruchengode and presented by the complainant for collection in City Union Bank, Fairlands Branch, Salem. The complaints were filed on 20.09.2021. The said complaints are accompanied by the proof affidavits and documents. The Judicial Magistrate on perusing the complaints, proof affidavits and material records has issued summons on 07.03.2022. The order passed for issuance of summons reads as below:-

“Perused complaint. Proof affidavit and material records. Prima facie case of offence U/s 141. 142 r/w 138 of Negotiable Instruments Act, 1881 (Amended) is made out. Hence, the complainant is ordered to be taken on file under Section 138 of Negotiable Instruments Act and posted to 07.04.2022 issue summons to accused. Call on 07.04.2022.”

15. In view of the conflicting view regarding Section 202(1) of Cr.P.C., in connection with the complaints filed under Section 138 of the



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Negotiable Instruments Act, 1881, the Constitutional Bench of the Hon'ble

Supreme Court in *Suo Moto Writ (Criminal)*No. 2 of 2020 reported in [(2021)

16 SCC 116], has made the following observations:-

“10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23-6-2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See :Vijay Dhanuka v. Najima Mamtaj [Vijay Dhanuka v. Najima Mamtaj, (2014) 14 SCC 638 : (2015) 1 SCC (Cri) 479] , Abhijit Pawar v. Hemant Madhukar Nimbalkar [Abhijit Pawar v. Hemant Madhukar Nimbalkar, (2017) 3 SCC 528 : (2017) 2 SCC (Cri) 192] and Birla Corpn. Ltd. v. Adventz Investments & Holdings Ltd. [Birla Corpn. Ltd. v. Adventz Investments & Holdings Ltd., (2019) 16 SCC 610 : (2020) 2 SCC (Civ) 713 : (2020) 2 SCC (Cri) 828]) There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other



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cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

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12. Another point that has been brought to our notice relates to the interpretation of Section 202(2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145(2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202(2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses



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*personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. **On a holistic reading of Section 145 along with Section 202, we hold that Section 202(2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202 of Cr.P.C.***

(emphasis added)

16. In *Sunil Todi v. State of Gujarat* reported in [2021 SCC Online SC 1174], a similar point was urged and the Hon'ble Supreme Court, apart from relying upon the Constitutional Bench judgment, *In Re:Expeditious Trial of*



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Cases under Section 138 of NIC, Suo Motu Writ (Criminal) No. 2 of 2020 cited

supra also relied upon the judgment in *Birla Corporation Ltd. v. Adventz Investments and Holdings (2019(16) SCC 610)*, and held that merely because the accused is residing outside the jurisdiction of the Court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case and further, it has also held that not conducting inquiry under Section 202 of Cr.P.C., would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

17. For better clarity the relevant part of the judgment in *Sunil Todi v. State of Gujarat* reported in [2021 SCC Online SC 1174], the Hon'ble Supreme Court is extracted below:-

“46. Section 145 of the NIT Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the Cr.P.C. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of



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the witnesses to be taken on oath. Consequently, it was held that Section 202(2) Cr.P.C is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.”

18. The Dictum laid in *Sunil Todi* following the Constitutional Bench Judgment, is the law of the land and the same has been consistently followed by the Courts in India. The judgments cited by the learned Senior Counsel appearing for the petitioner also does not say anything contrary to the dictum laid in the Constitutional Bench which is followed in *Sunil Todi* case.

19. At this juncture, it is relevant to refer Section 2(g), which defines inquiry and the interpretation of the expression 'inquiry' in the context of Section 202 (1) of Cr.P.C.

“2(g) “Inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court”



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20. The Hon'ble Supreme Court in *Birla Corporation Ltd. V. Adventz*

Investments and Holdings reported in (2019) 16 SCC 610), the Hon'ble

Supreme Court has explained the scope of term enquiry as below:-

“26.The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.

33.The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that



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the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood Ul Rehman [Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124]

The above principles have been reiterated in the judgment in Krishna lal Chawla v. State of U.P.(2021(5) SCC 435”.

21. In view of the above discussion, this Court finds that in the present case on hand, the learned Judicial Magistrate No.V, Salem, had complied with the requirement of Section 202(1) of Cr.P.C. The learned Judicial Magistrate has issued process only after making enquiry which is necessary to arrive at a *prima facie* conclusion whether there is sufficient ground for proceeding against the accused. Therefore, these petitions are liable to be dismissed.

22. In the result, **these Criminal Original Petitions are dismissed.** Consequently, connected Miscellaneous Petitions are closed.

06.05.2024

Index:yes
Neutral Citation:yes
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To:

The Judicial Magistrate No.V, Salem.



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DR.G.JAYACHANDRAN,J.

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delivery Common Order made in
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